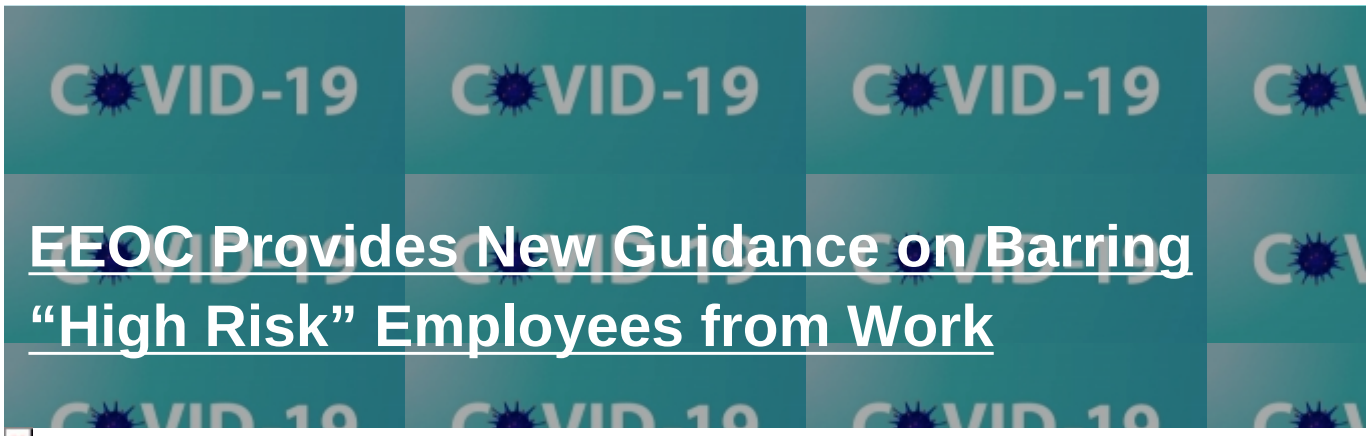


EEOC Provides New Guidance on Barring "High Risk" Employees from Work

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By John Vering

On June 17, 2020, the EEOC updated its technical assistance to address additional questions regarding how employers should deal with the issue of returning to the workforce employees at a higher risk of a severe COVID-19 illness. This advice is entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws" and is posted on the EEOC's website, eeoc.gov.

For example, the CDC advises that persons 65 and older are at a higher risk of developing a severe illness if they contract the COVID-19 virus. This recent EEOC guidance makes clear that an employer violates the Age Discrimination in Employment Act (ADEA) if it adopts a policy barring such employees from returning to work. However, the EEOC has advised that employers are free to provide such employees with greater flexibility regarding return to work accommodations than younger employees without fear that an employee age 40 to 64 could claim age discrimination, even though the ADEA does not require that persons over age 65 receive reasonable accommodation.

The EEOC states that antibody test results should not be used to make decisions about returning persons to the workplace because these tests are unreliable. However, it is lawful for an employer to use a reliable test for the presence of the COVID-19 virus before allowing an employee to return to work.

The EEOC also advises that it would be unlawful to prevent pregnant employees or employees with disabilities from returning to work out of a fear that they would suffer a severe case of COVID-19. However, these employees may be entitled to reasonable accommodation depending on the specific facts of their situation (absent undue hardship) under the Pregnancy Discrimination Act. The EEOC recommends flexibility in dealing with reasonable accommodation requests from such individuals such as temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment.

We highly recommend that our clients review this technical assistance advice and continue to monitor CDC and OSHA advice, as well as advice from state and local government authorities as we face the threat of increased COVID-19 exposures and illnesses.

This article is general in nature and does not constitute legal advice. Readers with legal questions about how this decision may affect your business and your employees should consult the author John Vering (jvering@sb-kc.com), or another employment law shareholder including Shannon Johnson, Brenda Hamilton, John Neyens, Mark Opara or your regular contact at Seigfreid Bingham at 816-421-4460.